

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>Michael Fern</b>	:	Case No. 1:18-cv-563
	:	
Plaintiff,	:	Judge Michael Barrett
	:	Magistrate Bowman
vs.	:	
	:	
<b>City of Cincinnati</b>	:	<b><u>AMENDED COMPLAINT;</u></b>
	:	<b><u>DEMAND FOR JURY TRIAL;</u></b>
	:	<b><u>REQUEST FOR INJUNCTIVE</u></b>
Defendant.	:	<b><u>RELIEF</u></b>

Now comes Plaintiff, Michael Fern (“Plaintiff”), and for his Amended Complaint against Defendant, City of Cincinnati (“Defendant”) states as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff is, and at all times material herein has been, a resident and citizen of the State of Ohio and an employee of Defendant, City of Cincinnati.
2. Defendant, City of Cincinnati is a governmental entity and political subdivision of the State of Ohio, located in Hamilton County, Ohio, and an employer within the meaning of all applicable Ohio and federal employment statutes and the common law.
3. Plaintiff’s Amended Complaint arises under the Family Medical Leave Act of 1993, as amended, 29 U.S.C. §2601 *et seq.* (Hereinafter “FMLA”), The Americans with Disabilities Act, as amended, 42 U.S.C. §12101 *et seq.* (hereinafter “ADA”) and state law.
4. This Court has original jurisdiction over Counts I, II, IV, V of the Amended Complaint pursuant to the Family Medical Leave Act of 1993, 29 U.S.C. §2617 (a)(2), and The Americans with Disabilities Act, as amended, 42 U.S.C. §12101 *et seq.*, and 28 U.S.C. §1331, because these claims arise under the federal laws of the United States, and this Court has supplemental jurisdiction over Count III of the Amended Complaint pursuant to

28 U.S.C. 1367 on the grounds that this Count is related to Counts I, II, IV, V for which the Court has original jurisdiction, that they form part of the same case or controversy.

5. Plaintiff timely filed a charge of unlawful Employment Disability Discrimination with the Equal Employment Opportunity Commission (“EEOC”) against Defendant and received a Notice of Right to Sue on the Charge on or about May 11, 2018. A true and accurate copy of Plaintiff’s Notice of Right to Sue is attached hereto as Exhibit 1 and incorporated herein by reference. A true and accurate copy of Plaintiff’s Charge is attached hereto as Exhibit 2 and incorporated herein by reference.
6. Both Plaintiff and Defendant reside within this judicial district and the events giving rise to the claims asserted herein all occurred within this judicial district so that venue is proper in the Southern District of Ohio pursuant to 28 U.S.C. §1391.
7. Plaintiff has complied with all prerequisites to this action under The Americans with Disabilities Act and has exhausted his administrative remedies.
8. The Defendant has engaged in a pattern and practice of permitting a hostile work environment, a pattern and practice of retaliation and a pattern and practice of violation of the FMLA and ADA and state law.

### **FACTUAL ALLEGATIONS**

9. Plaintiff hereby incorporates by reference all previous allegations in the Amended Complaint as if fully sets forth herein.
10. Plaintiff is employed full-time by Defendant as a Lieutenant with the City of Cincinnati Police Department.
11. On or about May of 2015, Plaintiff was diagnosed with the serious medical condition of high blood pressure.

12. Plaintiff's high blood pressure caused Plaintiff to suffer from migraines, dizziness, blurred vision and nausea and difficulty concentrating when he had migraines, dizziness, blurred vision and nausea.
13. Because of these side effects stemming from his high blood pressure, Plaintiff needed to take periodic time off, particularly when he had the above-referenced symptoms and side effects.
14. Subsequent to being diagnosed with high blood pressure, Plaintiff requested and was granted FMLA intermittent leave to take off on those days when Plaintiff's high blood pressure caused him to experience debilitating symptoms and side effects.
15. Though Plaintiff was granted FMLA intermittent leave for his serious medical condition, after he began taking intermittent leave, Defendant treated Plaintiff differently than other employees who had not requested FMLA and/or taken FMLA leave, and to retaliate against Plaintiff for taking FMLA leave.
16. For instance, in November 2015 Plaintiff was advised by Defendant that he would not receive pay for Field Training Officer Supervisor, despite his clear entitlement to it, and Plaintiff was forced to arbitrate the matter, which he won.
17. In November 2015 after he was diagnosed with high blood pressure and after he requested FMLA leave, Plaintiff was transferred to District 2, and immediately, in a meeting with Captain Jeff Butler and by email, was given expectations for Plaintiff's projected performance. On or about that same time Plaintiff was advised that he would not be approved for Field Training Officer Supervisor ("FTOS") overtime.
18. Shortly thereafter, Captain Butler advised an Executive Assistant Police Chief that the "expectations" regarding Plaintiff's projected performance were nothing more than setting the stage to terminate Plaintiff.

19. Shortly thereafter, on or about December 14, 2015, Plaintiff was falsely accused by Captain Butler of trespassing in his office.
20. On December 15, 2015, Executive Assistant Police Chief David Bailey accused Plaintiff of taking advantage of his position at District 2.
21. On December 18, 2015, Plaintiff was ordered by Captain Jeff Butler to submit a Form 17 as to Plaintiff's submission for FTOS pay and then was wrongfully accused by Captain Butler of insubordination.
22. On December 26, 2015, Plaintiff filed a Grievance with the FOP and an EEOC complaint with Defendant, complaining about his treatment.
23. Two days later, Executive Assistant Police Chief David Bailey made unfounded allegations towards Plaintiff's health and competency for duty and recommended further disciplinary action against Plaintiff.
24. During this time, Executive Assistant Police Chief David Bailey attacked Plaintiff's reputation and demeaned Plaintiff personally.
25. Executive Assistant Police Chief David Bailey recommended that Plaintiff remain on restricted duty even though Executive Assistant Police Chief David Bailey had no interaction with Plaintiff since Plaintiff's transfer to District 2.
26. According to Defendant's policy, FMLA was calculated on a rolling calendar basis.
27. On more than one occasion, when Plaintiff would seek to find out how much FMLA time he had remaining, he was given differing answers by different individuals working for Defendant who kept track of the information.
28. According to Defendant's policy, if paid leave or FMLA leave was exhausted, Plaintiff was permitted to take 40 additional hours of Sick Without Pay (SWOP) or Leave Without Pay (LWOP) within the calendar year.

29. On occasion, Plaintiff's FMLA intermittent leave did kick over to SWOP or LWOP.
30. On more than one occasion, when Plaintiff's leave did go to SWOP or LWOP he was disciplined for taking the time off.
31. On December 31, 2015, Captain Jeff Butler emailed Plaintiff stating that due to Plaintiff taking LWOP (Leave without Pay) and SWOP (Sick Without Pay), all of which were FMLA qualifying, Plaintiff was suspended from detail work and PVO.
32. On January 1, 2016, Captain Jeff Butler advised Plaintiff that he was still restricted to the district.
33. On January 20, 2016, Plaintiff requested information as to how he could appeal the restriction, and Police Chief David Bailey replied by suggesting that Plaintiff was a risk to himself or others, and would continue to be restricted.
34. In December of 2016, the Internal Investigations Unit of the Cincinnati Police Department issued a report relating to allegations of Plaintiff's misconduct. Only one was sustained against Plaintiff and a written reprimand issued, said written reprimand was subsequently overturned.
35. On July 28, 2017, Plaintiff received an Evaluation Supplement Log "ESL" ordering a detail and PVO suspension for 270 days for SWOP taken on 7/18/2017 and 7/19/2017, all of which was taken due to Plaintiff's disability of high blood pressure and were FMLA qualifying times off.
36. At the time he took off on July 18, 2017 and July 19, 2017, Plaintiff took time off as FMLA leave, understood that he had available FMLA leave, and called in as he was required to do.
37. It was only after the fact that, even though Payroll and Personnel confirmed to Plaintiff that he had available leave, Plaintiff was punished retroactively for taking the intermittent

leave as FMLA leave and received the ESL ordering detail and PVO suspension for 270 days.

38. On January 8, 2018, Plaintiff received a written reprimand for being SWOP in October of 2017.

39. That time for which Plaintiff was disciplined was time taken off due to Plaintiff's high blood pressure.

40. Though at the time Plaintiff attempted to exercise his FMLA rights by taking the time that he reasonably believed was FMLA qualifying, Plaintiff later learned, after being permitted to take the time off, that he had did not have available FMLA leave and, again was punished retroactively for exercising or attempting to exercise his rights under the FMLA.

41. On January 14, 2018, Captain Aaron Jones was transferred to District 2.

42. Prior to Captain Jones coming to District 2, Plaintiff understood that when he took unscheduled intermittent FMLA leave, he was to call any supervisor to so advise, which was the procedure whenever anyone called off, regardless of whether it was FMLA leave or not.

43. After Captain Jones arrived, he advised Plaintiff that he was only permitted to report taking FMLA leave to Captain Jones.

44. On February 12, 2018, Plaintiff attempted to take intermittent FMLA leave for his high blood pressure and notified Captain Aaron Jones via voicemail that he would not be able to appear in court that day, because he needed to take FMLA leave.

45. Plaintiff also contacted Sergeant Hahn and requested a Form 678 to not appear in court, which is the form to be filled out when a police officer is not going to be able to appear in court.

46. Captain Aaron Jones contacted Plaintiff via telephone and discussed the Form 678.

47. Captain Aaron Jones then contacted Captain Jeff Butler and, thereafter, Captain Jeff Butler, personnel from Internal Affairs and the Inspections Unit all proceeded to Plaintiff's home.
48. Having a Captain, Internal Affairs personnel and the Inspections Unit make a personal visit to an employee's home does not happen to employees who are not disabled and /or not exercising rights under the FMLA when they request time off. It was simply done for the purpose of harassing and intimidating Plaintiff.
49. Thereafter, Captain Aaron Jones issued a Pre-Disciplinary Hearing to Plaintiff for Dishonesty and Serious Insubordination for calling off sick for court under FMLA for Plaintiff's high blood pressure, which occurred on February 12, 2018.
50. Captain Aaron Jones also wrongfully accused Plaintiff of not being fit for duty and for being under the influence of alcohol at 7:00 A.M. on that date.
51. Plaintiff was given a mandatory referral to PEAP (Police Employee Assistance Program) for the incident, because Captain Jones, without any evidence, assumed that Plaintiff was drinking and not suffering from the side effects of his serious medical condition for which he was certified to take intermittent FMLA leave.
52. On July 28, 2018, Plaintiff received a Written Reprimand from Captain Aaron Jones for Incompetency, Inefficiency, Dishonesty, Insubordination, Neglect of Duty, Failure of Good Behavior, Substance Abuse, Excessive Absenteeism, and Violation of Civil Service Rules, all stemming from the February 12, 2018 incident when Plaintiff was harassed and intimidated and accused of not being sober on the day he called off for FMLA intermittent leave.
53. Defendant assumed that Plaintiff was not suffering from the medical condition causing him to exercise his FMLA right to intermittent leave on that day, and did not seek a second

opinion as to the propriety of Plaintiff's use of certified intermittent FMLA leave on that occasion.

54. Prior to the Written Reprimand being issued, Plaintiff has operated as the Night Inspector for the entire City of Cincinnati on February 28, 2018, March 1, 2018, March 9, 2018, March 10, 2018, March 12, 2018, April 3, 2018, April 4, 2018, April 5, 2018, April 20, 2018, April 28, 2018 and April 29, 2018, despite the allegations of Plaintiff being unfit for duty.
55. The July 28, 2018 Disciplinary Action was taken against Plaintiff because Plaintiff exercised his right to use intermittent FMLA leave for his certified medical condition.
56. Employees who are not disabled, perceived as disabled and/or have a history of disability and employees who are not exercising their rights or attempting to exercise their rights under the FMLA are not subjected to the above-described treatment.
57. When Plaintiff calls off for FMLA approved leave, he is now being required to call Captain Jones directly, which is a different procedure than that required of other employees not seeking to exercise rights under the FMLA or seeking reasonable accommodation. Other employees are permitted to contact any supervisor and are not required to only contact Captain Jones.
58. Since July 28, 2018, Plaintiff continues to be subjected to different terms and conditions of employment than co-workers who are not disabled, perceived as disabled, have a history of disability and/or who do not use FMLA time off.
59. According to Defendant's policies, employees who exhaust their paid time off are permitted an additional 40 hours of unpaid leave per calendar year, and if that is exhausted, employees may then request that they be permitted additional leave, which request according to the policy, should not be unreasonably denied.



60. On or about January 29, 2018, Plaintiff made a formal request to Police Chief Isaacs that he be permitted that additional time off when needed for his disabling condition of high blood pressure and its side effects.

61. Plaintiff's request constituted a request for a reasonable accommodation for his disability under state and federal employment statutes.

62. Plaintiff followed up on this request throughout the year.

63. On October 22, 2018, Captain Jones and Nudigate made a personal visit to Plaintiff's home, served Plaintiff with his performance review, and pre-discipline (which would require suspension of Plaintiff) for time taken beyond the 40 hours permitted when paid leave is exhausted.

64. Plaintiff reminded them of his request for reasonable accommodation as the time off for which he was going to be suspended was due to Plaintiff's disability.

65. Plaintiff was told orally that his request for reasonable accommodation was denied.

66. Defendant did not make any effort to explain why it would pose an unreasonable hardship to grant Plaintiff the reasonable accommodation, nor did Defendant make any effort to engage in an interactive process to determine if the disability could be accommodated in any other way.

67. In December of 2018, Plaintiff contacted one of his sergeants to find out who was working because he might need to call in on FMLA due to his high blood pressure.

68. Though Plaintiff did text Captain Jones about an hour later to let him know he was taking time off for FMLA due to his high blood pressure, Plaintiff was still suspended for 40 hours.

69. On January 12, 2019, defendant provided several employees within the police department with copies of Plaintiff's confidential medical information.

**COUNT I**

70. Plaintiff incorporates by reference the prior allegations of the Amended Complaint as if fully set forth herein.

71. Plaintiff suffers from a disability, actual or perceived, and/or has a history of suffering from a disability, all as defined by the ADA.

72. Plaintiff's high blood pressure constitutes a disability as defined by the ADA, affecting such major life activities as his ability to work, to concentrate and to perform day to day activities.

73. Plaintiff is qualified and able to perform the essential functions of his position with or without reasonable accommodation.

74. All of the above-described harassing actions of Defendant, including instituting unwarranted work restrictions, making unwarranted accusations about Plaintiff, engaging in differential treatment and disciplinary actions directed against Plaintiff, created a hostile work environment, constituted a continuous course of misconduct by Defendant, and these actions were all taken because of Plaintiff's disability, actual or perceived, or history of disability, in violation of the ADA.

75. As a direct and proximate result of Defendant's above-described misconduct, Plaintiff has been injured and Defendant is liable to Plaintiff for all damages caused by Defendant's misconduct, in an amount to be proven at trial.

**COUNT II**

76. Plaintiff incorporates by reference the prior allegations of the Amended Complaint as if fully set forth herein.

77. Plaintiff's high blood pressure constitutes a disability as defined by the ADA, affecting such major life activities as his ability to work, to concentrate and to perform day to day activities.
78. Plaintiff's request for intermittent leave constituted a request for reasonable accommodation under the ADA, which would allow Plaintiff to perform the essential functions of his position and was protected activity under the ADA.
79. All of the above-described conduct of Defendant, including harassing Plaintiff after he engaged in the protected activity, including subjecting him to different terms and conditions than non-disabled co-workers, by subjecting him to unwarranted work restrictions, and by disciplining him for using this reasonable accommodation, Defendant has engaged in a continuous course of retaliatory misconduct that violates the ADA.
80. As a direct and proximate result of Defendant's above described continuous course of misconduct, Plaintiff has been injured, and Defendant is liable to Plaintiff for all damages caused by Defendant's above-described misconduct, in an amount to be proven at trial.

### **COUNT III**

81. Plaintiff incorporates by reference the prior allegations of the Amended Complaint as if fully set forth therein.
82. Defendant is an employer within the definitions of Ohio Revised Code 4112.01 *et seq.*
83. Defendant's above-described activities and conduct were taken because of Plaintiff's disability, actual or perceived, or history of disability, and in retaliation for Plaintiff requesting or exercising his right to a reasonable accommodation under state law, all in violation of Ohio Revised Code 4112.01 *et seq.*
84. Defendant's actions in denying Plaintiff's January 29, 2018 request for reasonable accommodation, not engaging in any interactive process, and in punishing Plaintiff for

requesting the reasonable accommodation were discriminatory and retaliatory, and were all in violation of Ohio Revised Code §§4112. 01 *et seq.*

85. As a direct and proximate result of Defendant's above-described continuous course of misconduct, Plaintiff has been injured, and Defendant is liable to Plaintiff for all damage and injury caused by its misconduct, in an amount to be proven at trial.

#### **COUNT IV**

86. Plaintiff incorporates by reference the prior allegations of the Amended Complaint as if fully set forth herein.
87. At various times following his diagnosis of high blood pressure, a serious medical condition, Plaintiff has taken FMLA qualifying intermittent leave due to the symptoms and side effects of the high blood pressure.
88. Plaintiff met the statutory requirements to be eligible for FMLA leave.
89. Despite the fact that Plaintiff was entitled to take FMLA leave, and on repeated occasions from the fall of 2015 forward exercised and/or attempted to exercise his rights under the FMLA, all as described above, Plaintiff was disciplined for exercising his rights to take the time off.
90. Defendant has wrongfully required that Plaintiff follow procedures for taking FMLA that are different and more onerous than the procedures required of employees taking leave not FMLA qualified and are different from Defendant's procedures.
91. Defendant has permitted Plaintiff to take FMLA leave and then retroactively disciplined Plaintiff for taking the time, constituting discipline of Plaintiff for exercising or attempting to exercise his rights under the FMLA.
92. Defendant interfered with Plaintiff's FMLA rights in February of 2018 when Captain Jones questioned whether Plaintiff's request for FMLA was legitimate and, instead of

following the procedures required by the law when an employee questions the need for FMLA leave, such as seeking a second opinion, Defendant simply accused Plaintiff of being intoxicated and sent him to PEAP for alcohol abuse.

93. Though Defendant wrongfully made a snap decision that Plaintiff was intoxicated and not suffering from symptoms or side effects of his high blood pressure, Defendant still counted the time off as FMLA time taken.

94. All of the above-described actions of Defendant interfered with, restrained, denied or attempted to deny Plaintiff's exercise of his FMLA rights, and Defendant's actions violated the FMLA.

95. The actions of Defendant were intentional, malicious, willful, and as a direct and proximate result of the above-described misconduct, Plaintiff has been injured, and Defendant is liable to Plaintiff for all damages cause by the misconduct which are allowed under the FMLA, in an amount to be proven at trial.

#### **COUNT V**

96. Plaintiff incorporates by reference the prior allegations of the Amended Complaint as if fully set forth herein.

97. By all of its above-described actions, Defendant discriminated and retaliated against Plaintiff, including but not limited to when it disciplined Plaintiff for taking and/or attempting to take intermittent FMLA leave, when it has subjected Plaintiff to different and more onerous requirements in order that he be allowed to take FMLA intermittent leave, when it harassed Plaintiff by refusing to pay him for time to which he was entitled, when his supervisors and Internal Affairs have made a personal visit to his home to intimidate him for exercising his right to take FMLA leave in February of 2018, by making false accusations about Plaintiff and for issuing false discipline against Plaintiff, by sending

Plaintiff to PEAP in 2018, by supervisors again delivering discipline to Plaintiff at his home in October of 2018 and for issuing discipline to Plaintiff when he exercise and/or attempted to exercise FMLA rights in October of 2017.

98. The above-described actions of Defendant were retaliatory, interfered with, restrained, denied or attempted to deny Plaintiff's exercise of his FMLA rights, and Defendant's actions violated the FMLA.

99. The actions of Defendant were intentional, malicious, willful, and as a direct and proximate result of the above-described misconduct, Plaintiff has been injured, and Defendant is liable to Plaintiff for all damages allowed under the FMLA and caused by the misconduct, in an amount to be proven at trial.

**WHEREFORE**, Plaintiff demands judgment against Defendant as follows:

1. Defendant be enjoined from further unlawful conduct as described above;
2. Plaintiff be awarded all lost pay and benefits;
3. Plaintiff be awarded compensatory damages in an amount to be proven at trial but in excess of \$25,000.00;
4. That Plaintiff be awarded liquidated damages;
5. That Plaintiff be awarded costs and reasonable attorney fees; and
6. That Plaintiff be awarded such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Mary Jill Hukan  
Mary Jill Hukan (Ohio #: 0074457)  
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**JURY DEMAND**

Plaintiff demands trial by jury on all issues so triable.

Respectfully submitted,

/s/ Mary Jill Hukan  
Mary Jill Hukan (0074457)  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served on August 1, 2019 on the following by this Court's electronic case filing service ("ECF")

City of Cincinnati  
Lauren Creditt Mai  
[Lauren.credittmai@cincinnati-oh.gov](mailto:Lauren.credittmai@cincinnati-oh.gov)  
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/s/ Mary Jill Hukan  
Mary Jill Hukan (0074457)  
Counsel for Plaintiff